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9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**

11 KEVIN STUART, Individually and on behalf of
12 all others similarly situated,

13 Plaintiff,

14 v.

15 GINKGO BIOWORKS HOLDINGS, INC.
16 F/K/A SOARING EAGLE ACQUISITION
17 CORP., HARRY E. SLOAN, JASON KELLY,
18 and MARK DMYTRUK,

19 Defendants.

Case No:

**CLASS ACTION COMPLAINT FOR
VIOLATIONS OF THE FEDERAL
SECURITIES LAWS**

JURY TRIAL DEMANDED

20 Plaintiff Kevin Stuart (“Plaintiff”), individually and on behalf of all other persons similarly
21 situated, by Plaintiff’s undersigned attorneys, for Plaintiff’s complaint against Defendants (defined
22 below), alleges the following based upon personal knowledge as to Plaintiff and Plaintiff’s own
23 acts, and information and belief as to all other matters, based upon, *inter alia*, the investigation
24 conducted by and through Plaintiff’s attorneys, which included, among other things, a review of
25 the defendants’ public documents, conference calls and announcements made by defendants,
26 United States Securities and Exchange Commission (“SEC”) filings, wire and press releases
27 published by and regarding Ginkgo Bioworks Holdings, Inc. f/k/a Soaring Eagle Acquisition Corp.
28 (“Ginkgo” or the “Company”), analysts’ reports and advisories about the Company, and other

1 information readily obtainable on the Internet. Plaintiff believes that substantial evidentiary support
2 will exist for the allegations set forth herein after a reasonable opportunity for discovery.

3
4 **NATURE OF THE ACTION**

5 1. This is a federal securities class action on behalf of a class consisting of all persons
6 and entities other than Defendants who purchased or otherwise acquired the publicly traded
7 securities of Ginkgo between May 11, 2021 and October 5, 2021, both dates inclusive (the “Class
8 Period”). Plaintiff seeks to recover compensable damages caused by Defendants’ violations of the
9 federal securities laws and to pursue remedies under Sections 10(b) and 20(a) of the Securities
10 Exchange Act of 1934 (the “Exchange Act”) and Rule 10b-5 promulgated thereunder.

11 **JURISDICTION AND VENUE**

12 2. The claims asserted herein arise under and pursuant to §§10(b) and 20(a) of the
13 Exchange Act (15 U.S.C. §§78j(b) and §78t(a)) and Rule 10b-5 promulgated thereunder by the SEC
14 (17 C.F.R. §240.10b-5).

15 3. This Court has jurisdiction over the subject matter of this action under 28 U.S.C.
16 §1331 and §27 of the Exchange Act.

17 4. Venue is proper in this District pursuant to §27 of the Exchange Act (15 U.S.C.
18 §78aa) and 28 U.S.C. §1391(b) as the alleged misstatements entered and the subsequent damages
19 took place in this judicial district. Further, the Company maintains an office within this judicial
20 district.

21 5. In connection with the acts, conduct, and other wrongs alleged in this Complaint,
22 Defendants, directly or indirectly, used the means and instrumentalities of interstate commerce,
23 including but not limited to, the United States mail, interstate telephone communications and the
24 facilities of the national securities exchange.
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PARTIES

1
2 6. Plaintiff, as set forth in the accompanying Certification, purchased the Company’s
3 securities at artificially inflated prices during the Class Period and was damaged upon the revelation
4 of the alleged corrective disclosure.

5 7. Defendant Ginkgo purportedly operates a horizontal platform for cell programming,
6 designed to enable biological production of products as diverse as novel therapeutics, key food
7 ingredients, and chemicals currently derived from petroleum. Before the merger with special
8 purpose acquisition company (“SPAC”) Soaring Eagle Acquisition Corp. (“Soaring Eagle”), the
9 Company was known as Ginkgo Bioworks, Inc.

10 8. The Company is incorporated in Delaware and has its headquarters in Boston,
11 Massachusetts. Ginkgo maintains an office in Emeryville, California. Shares of Ginkgo’s common
12 stock have been listed on the New York Stock Exchange (“NYSE”) under the ticker symbol “DNA”
13 since September 17, 2021. Prior to the merger, the Company’s ordinary shares traded on the
14 NASDAQ under the ticker symbol “SRNG.”

15 9. Defendant Harry E. Sloan (“Sloan”) is and was at all pertinent times the Chief
16 Executive Officer (“CEO”) and Chairman of Soaring Eagle. Since the merger, Sloan has served as a
17 Director of Ginkgo.

18 10. Defendant Jason Kelly (“Kelly”) is one of Ginkgo’s founders. He is and was at all
19 pertinent times the CEO of Ginkgo, as well as a Director of the Company.

20 11. Defendant Mark Dmytruk (“Dmytruk”) is and was at all pertinent times the Chief
21 Financial Officer (“CFO”) of Ginkgo.

22 12. Defendants Sloan, Kelly, and Dmytruk are sometimes referred to herein as the
23 “Individual Defendants.”

24 13. Each of the Individual Defendants:

25 (a) directly participated in the management of the Company;

26 (b) was directly involved in the day-to-day operations of the Company at the highest
27 levels;

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- 1 (c) was privy to confidential proprietary information concerning the Company and its
2 business and operations;
- 3 (d) was directly or indirectly involved in drafting, producing, reviewing and/or
4 disseminating the false and misleading statements and information alleged herein;
- 5 (e) was directly or indirectly involved in the oversight or implementation of the
6 Company's internal controls;
- 7 (f) was aware of or recklessly disregarded the fact that the false and misleading
8 statements were being issued concerning the Company; and/or
- 9 (g) approved or ratified these statements in violation of the federal securities laws.

10 14. The Company is liable for the acts of the Individual Defendants and its employees
11 under the doctrine of *respondeat superior* and common law principles of agency because all of the
12 wrongful acts complained of herein were carried out within the scope of their employment.

13 15. The scienter of the Individual Defendants and other employees and agents of the
14 Company is similarly imputed to the Company under *respondeat superior* and agency principles.

15 16. The Company and the Individual Defendants are referred to herein, collectively, as
16 the "Defendants."

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18 **SUBSTANTIVE ALLEGATIONS**

19 **Materially False and Misleading Statements**

20 17. On May 11, 2021, the Company issued a Press Release, attached to Soaring Eagle's
21 Form 8-K filing with the SEC that same day, entitled "Ginkgo Bioworks to Become a Public
22 Company and Expand its Leading Platform for Cell Programming." The press release announced
23 that Ginkgo Bioworks, Inc. had entered into a definitive business combination with Soaring Eagle
24 that would result in Ginkgo Bioworks, Inc. becoming a publicly-listed company via SPAC merger.
25 The press release stated that "[t]he *transaction implies a pre-money equity valuation for Ginkgo*
26 *of \$15.0 billion*, and is expected to provide up to \$2.5 billion of gross cash proceeds." (Emphasis
27 added).
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1 We generate Foundry revenue through the execution of license and collaboration
2 agreements whereby customers obtain license rights to our proprietary technology
3 and intellectual property for use in the development and commercialization of
4 engineered organisms and derived products. Under these agreements, we typically
5 provide R&D services for cell programming with the goal of producing an
6 engineered cell that meets a mutually agreed specification. Our customers obtain
7 license rights to the output of our services, which are primarily the optimized
8 strains or cell lines, in order to manufacture and commercialize products derived
9 from that licensed strain or cell line. Generally, the terms of these agreements
10 provide that we receive some combination of (i) upfront payments upon
11 consummation of the agreement that are recognized over our period of
12 performance, (ii) reimbursement for costs incurred for R&D services, (iii)
13 milestone payments upon the achievement of specified technical and/or
14 commercial criteria, (iv) royalties on sales of products from or comprising
15 engineered organisms arising from the license and collaboration agreement and
16 (v) royalties related to cost of goods sold reductions realized by our customers.
17 For the three months ended March 31, 2021 and 2020 and the years ended
18 December 31, 2020 and 2019, royalties did not comprise a material amount of our
19 revenue.

20 *Foundry revenue includes transactions with Platform Ventures (Motif, Joyn,*
21 *Allonnia and Kalo) as well as other Structured Partnerships (Genomatica and*
22 *Synlogic) where, as part of these transactions, we received an equity interest in*
23 *such entities. Specifically related to the Platform Ventures, in these*
24 *transactions, we received upfront non-cash consideration in the form of*
25 *common equity interests in these entities, while the Platform Ventures each*
26 *received cash equity investments from industry-leading strategic partners and*
27 *financial investors. We view the upfront non-cash consideration as prepayments*
28 *for licenses which will be granted in the future as we complete mutually agreed*
upon technical development plans. In these instances, we also receive cash
payments for our costs incurred for the R&D services performed by us, plus a
margin. We are not compensated through additional milestone or royalty
payments under these arrangements. Our transactions with Genomatica and
Synlogic included the purchase of equity securities and the provision of R&D
services. As we perform R&D services under the mutually agreed upon
development plans, we recognize a reduction in the prefunded obligation based on
a cost incurred, plus margin. Because of our equity holdings in these entities,
each is considered as a related party. These arrangements are further described in
Notes 8, 17 and 21 of our audited consolidated financial statements and in Notes
7, 8, 15 and 17 of our unaudited condensed consolidated financial statements
included elsewhere in this proxy statement/prospectus.

Downstream value share in the form of equity interest appreciation is not
recognized as revenue but is expected to contribute to future cash flows upon
liquidation, the amount and timing of which is inherently unpredictable. Equity

investees are accounted for as equity method investments or cost method investments.

(Emphasis added).

20. The Proxy Statement reported the following revenue from related parties:

21. Related Parties

Related party transactions included in the Consolidated Balance Sheets, excluding the Company's investments and equity method investments, are summarized below (in thousands):

	Joyn	Motif	Genomatica	Allonnia	Synlogic	Total
Balances as of December 31, 2020						
Accounts receivable, net	\$ —	\$ 2,403	\$ 1,500	\$ 1,309	\$ —	\$ 5,212
Prepaid expenses and other current assets	\$ 24	\$ 232	\$ —	\$ 13	\$ —	\$ 269
Deferred revenue, current and non-current	\$ 9,862	\$ 53,952	\$ 30,128	\$ 26,064	\$ 72	\$ 120,078
Balances as of December 31, 2019						
Accounts receivable, net	\$ 163	\$ 4,054	\$ —	\$ —	\$ —	\$ 4,217
Deferred revenue, current and non-current	\$ 17,135	\$ 62,513	\$ 38,059	\$ 24,480	\$ 144	\$ 142,331

Related party transactions included in the Consolidated Statements Operations and Comprehensive Loss, excluding the losses on the Company's investments and equity method investments, are summarized below (in thousands):

	Joyn	Motif	Genomatica	Allonnia	Synlogic	Glycosyn	Total
For the Year Ended December 31, 2020							
Foundry revenue	\$ 7,273	\$ 20,798	\$ 9,431	\$ 4,960	\$ 73	\$ —	\$ 42,535
Other income, net	\$ 407	\$ 314	\$ —	\$ —	\$ —	\$ —	\$ 721
For the Year Ended December 31, 2019							
Foundry revenue	\$ 9,349	\$ 18,986	\$ 6,248	\$ —	\$ 17	\$ 668	\$ 35,268
Interest income	\$ —	\$ —	\$ —	\$ —	\$ —	\$ 163	\$ 163
Other income, net	\$ 222	\$ 42	\$ —	\$ —	\$ —	\$ 1,530	\$ 1,794

21. In the months leading up to the IPO, the Company announced a flurry of new R&D partners. For example, on August 12, 2021, the Company issued a press release announcing a partnership with Antheia to “accelerate the development and production of essential medicines.” According to the press release, “Antheia plans to leverage Ginkgo’s high throughput enzyme design and screening capabilities to broaden its pipeline of critical active pharmaceutical ingredients (APIs) and key starting materials (KSMs).” However, the press release does not mention that Ginkgo’s largest investor, Viking Global Opportunities Illiquid Investments Sub-Master LP, had just led Antheia’s \$73 million financing a few weeks prior to the partnership announcement.

22. Shortly thereafter, the Company announced another partnership agreement with Tantu, a company that engineers living biotherapeutic products to treat gastrointestinal diseases. On September 7, 2021, the Company issued a press release stating, in pertinent part, that “Tantu

1 25. The report was based on an “intensive investigation into Ginkgo’s business model
2 and practices, with a particular focus on the related-party entities that drive the bulk of its revenue.”
3 As part of this investigation, Scorpion Capital “completed 21 research interviews, encompassing a
4 broad sample of former employees and executives of Ginkgo, as well as individuals who are
5 currently employed at its related-party “customers.”

6 26. The Scorpion Capital report stated the following, in pertinent part, about related
7 party transactions:

8
9 *. . . The majority of [Ginkgo’s] foundry revenue, an absurd 72% in 2020, and*
10 *essentially 100% of its deferred revenue are derived from related-party*
11 *“customers” it created, funded, controls, or influences via its ownership*
12 *position and board seats. Investments into these entities by Ginkgo and its largest*
13 *investors are recycled back to Ginkgo and recorded as deferred or current*
14 *revenue. The scheme reflects its woeful, decade-long failure to derive real*
15 *revenue from third-party customers, forcing it to cover it up with a ploy that we*
16 *believe to be enabled by its largest holders.*

17 **[] We believe that Ginkgo is concealing the true extent of its dependence on**
18 **related party revenue** and that it is far greater than it reports. We have
19 uncovered a smoking gun that indicates that *essentially ALL of its foundry*
20 *revenue is derived from related parties, suggesting that Ginkgo has engaged in*
21 *a brazen effort to misclassify and misreport related party revenue and deceive*
22 *investors with phony accounting.* Our interviews with ex-employees indicated
23 fear inside Ginkgo that its related-party model would fail regulatory scrutiny and
24 derail an IPO, which we believe has prompted a cover-up of its magnitude.

25 . . . Ginkgo is opaque about the percent of its revenue and deferred revenue which
26 is cash versus non-cash. Based on interviews with its related-party “customers,”
27 **we believe that at least half of Ginkgo’s reported foundry revenue is**
28 **phantom – that is, non-cash and pure accounting hocus-pocus.** We spoke with
one of its largest such customers, from whom Ginkgo reported \$38MM and
\$30MM of deferred revenue in 2019 and 2020. A senior employee there stated
unequivocally that they have never paid Ginkgo cash for foundry services and are
merely using “free” R&D credits following investments by Ginkgo and Viking.
Giving away the essence of the scam, the customer stated they would not use
Ginkgo if they had to pay cash, dismissing them as a failed contract research
organization (CRO) that they neither trust to deliver nor could justify except
under a round-tripping deal.

(Emphasis added).

27. The Scorpion Capital report claimed that Ginkgo underreported its related party transactions in order to go public, stating in pertinent part:

We noted earlier that the majority of Ginkgo’s foundry revenue comes from related party entities: 65% in 2019, 72% in 2020, and 56% in 2021. **We believe that the actual figure is essentially 100%, and think that Ginkgo is misclassifying and underreporting related party revenue.** While the reported 60-70% percentage is bad enough and indicative of a broken, hocus-pocus business model, it’s still better than 100%. Ginkgo can claim that at least 30-40% of foundry revenue comes from third parties, and that its reliance decreased in Q1 2021 to “only” 56%. Ex-employees indicated **fear inside Ginkgo that its related party model doesn’t stand up to regulatory scrutiny and could prevent it from going public – hence, we believe, an effort to fake the reported figure.**

(in thousands)

	Year Ended December 31,	
	2020	2019
Foundry revenue (includes related party revenue of \$42,535 and \$35,268, respectively)	\$ 59,221	\$ 54,184

in millions USD	2019	2020	Q1 2021
Foundry revenue by related party			
Joyn	9,349	7,273	1,598
Motif	18,986	20,798	5,492
Genomatica	6,248	9,431	3,298
Allonnia		4,960	2,266
Synlogic	17	73	6
Glycosyn	668	-	-
Kalo	-	-	-
Total	35,268	42,535	12,660
Total foundry revenue	54,184	59,221	22,504
Related parties as % of total foundry revenue	65%	72%	56%

Reported related party foundry revenues totaled 65% in 2019 and 72% in 2020

Source: Soaring Eagle Acquisition Corp prospectus 8/13/2021, <https://www.sec.gov/Archives/edgar/data/0001830214/000119312521246097/d177007d424b3.htm>; Scorpion Capital analysis and estimates

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28. The Scorpion Capital report highlighted one related party, Synlogic, to show how Ginkgo was underreporting its related party revenue. The report explained:

As we examined Ginkgo’s related party disclosures, we noted a major anomaly: Ginkgo invested \$80MM in Synlogic in 2018, but disclosed almost no revenue from it in 2019 and 2020 in the footnotes. Similarly, it reported a minimal deferred revenue balance with Synlogic, in Note 21 in the SPAC prospectus. **In every other case, Ginkgo aggressively booked revenue and deferred revenue from related parties** in which it invested.

* * *

As Synlogic is a publicly-traded microcap (ticker: SYBX) with \$150MM market cap, we examined its SEC filings. We were amused, but not surprised, to discover that Synlogic’s 2020 10K, under Note 16 for Related-Party

1 Transactions, disclosed that Synlogic “used \$13.6 million of the pre-paid
 2 research and development expenses” in 2020. This is in stark contrast to
 3 Ginkgo’s related party disclosure, which reports only \$73K of foundry
 4 revenue from Synlogic.

* * *

5 Synlogic’s disclosures suggest that Ginkgo has misclassified Synlogic’s R&D
 6 spend in order to conceal its near-total dependence on parties it finances. Had
 7 Ginkgo included Synlogic’s foundry spend of \$13.6MM, related party revenues as
 8 a percent of total would have jumped from 72% to 95% - that is, Ginkgo would
 9 have had to admit that its foundry is a flop and that it can’t get customers unless it
 10 gives them cash and round-trips the proceeds.

11 **Related party revenue as reported**

In millions USD	2020
Foundry revenue by related party	
Joyn	7,273
Motif	20,798
Genomatica	9,431
Allonnia	4,960
Synlogic	73
Glycosyn	-
Kalo	-
Total	42,535
Total foundry revenue	59,221
Related parties as % of total foundry revenue	72%

12 **Adjusted to include Synlogic revenue**

In millions USD	2020
Foundry revenue by related party	
Joyn	7,273
Motif	20,798
Genomatica	9,431
Allonnia	4,960
Synlogic	13,600
Glycosyn	-
Kalo	-
Total	56,062
Total foundry revenue	59,221
Related parties as % of total foundry revenue	95%

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19 29. The Scorpion Capital report also alleged that in the months leading up to the SPAC
 20 merger, “Ginkgo has announced a flurry of new R&D partners, a dog whistle that the scam is
 21 about to hit overdrive. We believe these ‘partners’ are undisclosed related parties and fronts.

22 Without proliferating new round-tripping arrangements, Ginkgo can’t show ‘growth’ in Q3 and
 23 coming quarters.” The report further alleged:

24 The number of new “partners” announced in the last few weeks just prior to
 25 the first day of trading on Sep 17th is stunning. The partnerships are for
 26 everything under the sun: GI drugs, probiotics, herbal medicines and
 27 nutraceuticals, “biomaterials,” dyes, a material inspired by spiders with “silk-like
 28 softness.” Notably, not one of the releases below discloses a deal size – and all are
silent on the critical question of whether they are undisclosed related parties
– that is, whether Ginkgo or its investors like Viking are investors in the
entities or are providing proceeds that will be round-tripped back to Ginkgo

1 as “revenue” in coming quarters. We shortly reveal a smoking gun that
2 exposes the rig as exactly that.

3 30. For example, the report explains that “The press release for Ginkgo’s Antheia
4 partnership on Aug 12, 2021 makes no mention of the fact that Viking led Antheia’s \$73MM
5 financing a few weeks prior to the Ginkgo announcement.”

6 31. Similarly, weeks after the Antheia partnership announcement, Ginkgo announced a
7 partnership with Tantu. However, according to the Scorpion Capital report, this partnership was a
8 concealed related party transaction and front:

9 The Tantu partnership announced less than a week after Cambium is particularly
10 grandiose: “Tantu will leverage Ginkgo’s foundries to accelerate strain
11 construction as a key step toward human clinical trials.” Clinical trials
12 presume an advanced program, typically after tens or hundreds of millions spent
13 on R&D. Imagine our surprise after discovering that **Tantu appears to have no**
14 **full-time employees. It doesn’t even appear to be a company, nor even a**
15 **project – merely an idea.** Co-founder Neel Joshi is a full time associate professor
16 at Northeastern; a second co-founder is currently CEO of another startup; a third
17 was a post-doc in Joshi’s lab until August, when she took another job.

18 * * *

19 Similar to Cambium, we suspected that Tantu is also an undisclosed related-party
20 in which Ginkgo has or will make an investment which will be recycled back as
21 “revenue.” We spoke with an individual closely involved with Tantu, who
22 indicated that Tantu has raised \$50k to date via a university grant – “just enough
23 to get a website and stuff like that and incorporate.” The individual stated that
24 Tantu “doesn’t have money to pay” Ginkgo for R&D services, so “the deal
25 ended up being like a deferred loan, essentially, for the work they are going
26 to do.” The individual did not disclose the amount of funding Ginkgo
27 provided, but indicated it was similar in magnitude to a Series A round.

28 32. The Scorpion Capital report also alleged that “[a]side from its ‘customers’ being
related parties and effectively fake, we believe that Ginkgo takes the scam into even more
aggressive territory by booking revenue from them that is simply fictitious, overstated, and/or based
on overcharging.” For example, the report stated:

We begin with two observations: 1) the R&D and G&A services fees that Ginkgo
charges these “customers” and books as revenue and/or deferred revenue bears
no plausible relationship to their size, suggesting they are fraudulent; 2) the

1 38. Plaintiff's claims are typical of the claims of the members of the Class as all
2 members of the Class are similarly affected by Defendants' wrongful conduct in violation of federal
3 law that is complained of herein.

4 39. Plaintiff will fairly and adequately protect the interests of the members of the Class
5 and has retained counsel competent and experienced in class and securities litigation. Plaintiff has
6 no interests antagonistic to or in conflict with those of the Class.

7 40. Common questions of law and fact exist as to all members of the Class and
8 predominate over any questions solely affecting individual members of the Class. Among the
9 questions of law and fact common to the Class are:

- 10 • whether the federal securities laws were violated by Defendants' acts as alleged
11 herein;
- 12 • whether statements made by Defendants to the investing public during the Class
13 Period misrepresented material facts about the financial condition, business,
14 operations, and management of the Company;
- 15 • whether Defendants' public statements to the investing public during the Class
16 Period omitted material facts necessary to make the statements made, in light of the
17 circumstances under which they were made, not misleading;
- 18 • whether the Individual Defendants caused the Company to issue false and misleading
19 SEC filings and public statements during the Class Period;
- 20 • whether Defendants acted knowingly or recklessly in issuing false and misleading
21 SEC filings and public statements during the Class Period;
- 22 • whether the prices of the Company's securities during the Class Period were
23 artificially inflated because of the Defendants' conduct complained of herein; and
- 24 • whether the members of the Class have sustained damages and, if so, what is the
25 proper measure of damages.

26 41. A class action is superior to all other available methods for the fair and efficient
27 adjudication of this controversy since joinder of all members is impracticable. Furthermore, as the
28 damages suffered by individual Class members may be relatively small, the expense and burden of

1 individual litigation make it impossible for members of the Class to individually redress the wrongs
2 done to them. There will be no difficulty in the management of this action as a class action.

3 42. Plaintiff will rely, in part, upon the presumption of reliance established by the fraud-
4 on-the-market doctrine in that:

- 5 • Defendants made public misrepresentations or failed to disclose material facts during
6 the Class Period;
- 7 • the omissions and misrepresentations were material;
- 8 • the Company's securities are traded in efficient markets;
- 9 • the Company's securities were liquid and traded with moderate to heavy volume
10 during the Class Period;
- 11 • the Company traded on the NYSE or the NASDAQ, and was covered by multiple
12 analysts;
- 13 • the misrepresentations and omissions alleged would tend to induce a reasonable
14 investor to misjudge the value of the Company's securities; and
- 15 • Plaintiff and members of the Class purchased and/or sold the Company's securities
16 between the time the Defendants failed to disclose or misrepresented material facts
17 and the time the true facts were disclosed, without knowledge of the omitted or
18 misrepresented facts.

19 43. Based upon the foregoing, Plaintiff and the members of the Class are entitled to a
20 presumption of reliance upon the integrity of the market.

21 44. Alternatively, Plaintiff and the members of the Class are entitled to the presumption
22 of reliance established by the Supreme Court in *Affiliated Ute Citizens of the State of Utah v. United*
23 *States*, 406 U.S. 128, 92 S. Ct. 2430 (1972), as Defendants omitted material information in their
24 Class Period statements in violation of a duty to disclose such information, as detailed above.

25 **COUNT I**

26 **Violation of Section 10(b) of The Exchange Act and Rule 10b-5**
27 **Against All Defendants**

28 45. Plaintiff repeats and realleges each and every allegation contained above as if fully
set forth herein.

1 46. This Count is asserted against the Company and the Individual Defendants and is
2 based upon Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated
3 thereunder by the SEC.

4 47. During the Class Period, the Company and the Individual Defendants, individually
5 and in concert, directly or indirectly, disseminated or approved the false statements specified above,
6 which they knew or deliberately disregarded were misleading in that they contained
7 misrepresentations and failed to disclose material facts necessary in order to make the statements
8 made, in light of the circumstances under which they were made, not misleading.

9 48. The Company and the Individual Defendants violated §10(b) of the 1934 Act and
10 Rule 10b-5 in that they:

- 11 • employed devices, schemes and artifices to defraud;
- 12 • made untrue statements of material facts or omitted to state material facts necessary
13 in order to make the statements made, in light of the circumstances under which they
14 were made, not misleading; or
- 15 • engaged in acts, practices and a course of business that operated as a fraud or deceit
16 upon plaintiff and others similarly situated in connection with their purchases of the
17 Company's securities during the Class Period.

18 49. The Company and the Individual Defendants acted with scienter in that they knew
19 that the public documents and statements issued or disseminated in the name of the Company were
20 materially false and misleading; knew that such statements or documents would be issued or
21 disseminated to the investing public; and knowingly and substantially participated, or acquiesced in
22 the issuance or dissemination of such statements or documents as primary violations of the
23 securities laws. These defendants by virtue of their receipt of information reflecting the true facts of
24 the Company, their control over, and/or receipt and/or modification of the Company's allegedly
25 materially misleading statements, and/or their associations with the Company which made them
26 privy to confidential proprietary information concerning the Company, participated in the
27 fraudulent scheme alleged herein.

28

